

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:CTM:SD:POSTF-126397-02

RECudlip

date:

to: Jimmy Chan, Revenue Agent, EG 1236  
450 Golden Gate Avenue, San Francisco, CA 94102

from: LMSB Practice Group, San Diego

---

subject: I.R.C. SECTION 6112: NON-U.S. INVESTORS

TIN: [REDACTED]  
[REDACTED]  
[REDACTED]

This memorandum responds to your request for advice concerning I.R.C. section 6112 as it applies to tax shelter transactions sold to non-U.S. investors.

ISSUE

Whether the investor list requirement of I.R.C. section 6112 applies to tax shelters registered under I.R.C. section 6111 if the shelters were sold to non-U.S. investors.

CONCLUSION

The investor list requirement under I.R.C. section 6112 requires a promoter to provide the requisite information not only as to U.S. investors but also as to non-U.S. investors as well. The Service should pursue the investor list information as to the non-U.S. investors. Firstly, under the terms of I.R.C. section 6112, the Service is entitled to the investor list information for any transaction [REDACTED] registered under section 6111, without regard to whether the investors are non-U.S. investors. Secondly, the Service is entitled to confirm the correctness of [REDACTED]'s statement that the investors are in fact non-U.S. investors and that the Service has no interest in pursuing a tax liability against those non-U.S. investors. Thirdly, the non-U.S. investors may be entities through which a U.S. person's tax liability is affected. Fourthly, the non-U.S. investor may have transferred the tax shelter interest to a person who has a U.S. tax liability.

FACTS

You are conducting a promoter penalty examination under I.R.C. sections 6707 and 6708 of [REDACTED] ("REDACTED"). I.R.C. sections 6707 and 6708 apply to promoters who fail to comply with the registration and investor list requirements of I.R.C. sections 6111 and 6112, respectively. [REDACTED] registered certain tax shelter transactions as required under I.R.C. section 6111. [REDACTED] has provided the investor list information as to shelters sold to U.S. investors; however, [REDACTED] claims that some of the tax shelters were sold to individuals or entities that are non-U.S. investors. [REDACTED]'s position is that it is not required to provide the investor list information for those tax shelters involving non-U.S. investors. By non-U.S. investors, we assume that [REDACTED] is referring to individuals or entities which [REDACTED] believes have no United States tax filing requirement or liability.

ANALYSIS

I.R.C. section 6111 requires organizers of certain specially identified tax shelters to register them with the Service. The term "tax shelter" is defined by section 6111(c)(1) to include any investment:

1. with respect to which any person could reasonably infer from the representations made (or to be made) in connection with the offering for sale of interests in the investment that the tax shelter ratio for any investor as of the close of any of the first 5 years ending after the date on which such investment is offered for sale may be greater than 2 to 1, and
2. which is:
  - a) required to be registered under a Federal or State law regulating securities,
  - b) sold pursuant to an exemption from registration requiring the filing of a notice with a Federal or State agency regulating the offering or sale of securities, or
  - c) a substantial investment.

The tax shelter ratio means, with respect to any year, the ratio which:

1. the aggregate amount of the deductions and 350% of the credits which are represented to be potentially allowable to any investor under subtitle A for all periods up to (and including) the close of such year, bears to

2. the investment base as of the close of such year.

To be subject to the registration requirement, a tax shelter must meet the definition of a tax shelter. Tax shelters are defined by reference to deductions and credits under the Internal Revenue Code (subtitle A -- which governs income taxes). If from the representations made, or to be made, in connection with the offering for sale of interests in the investment, a person could reasonably infer that tax benefits under the Internal Revenue Code meet the tax shelter ratio, then the investment is a tax shelter requiring registration.

The statute does not specifically say that the investment must be offered for sale to, or sold to, U.S. investors, just that the appropriate reasonable inference could be made. It seems unlikely, however, that the reasonable inference could be made by someone not subject to United States tax since it is likely that such an investor would not have a reason to consider United States tax consequences. In any event, however, [REDACTED] did register the transactions under I.R.C. § 6111, so apparently [REDACTED] considered the definition of a tax shelter satisfied for purposes of certain transactions.

Internal Revenue Code section 6112 requires organizers of potentially abusive tax shelters to maintain and provide to the Service a list identifying each person who was sold an interest in such shelter and certain additional information as set forth in the Treasury Regulations. Potentially abusive tax shelters are defined to mean

1. any tax shelter (as defined in section 6111) with respect to which registration is required under section 6111, and
2. any entity, investment plan or arrangement, or other plan or arrangement which is of a type which the Service determines by regulations as having a potential for tax avoidance or evasion.

Section 6112 does not set forth any exceptions for tax shelters sold to non-U.S. investors.

[REDACTED] has declined to provide the investor list information under section 6112 on the ground that the investors were non-U.S. investors. That certain registered tax shelters may have ultimately been sold to non-U.S. investors is not a basis for not complying with the investor list information requirements of section 6112. In our opinion, [REDACTED] is required to provide the investor list information for the transactions it registered

without regard to whether the ultimate purchasers were U.S. investors or non-U.S. investors.

We can think of four reasons that the Service should pursue the investor list information as to the non-U.S. investors.

Firstly, the Service is entitled to the investor list information under section 6112 for any transaction [REDACTED] registered under section 6111, without regard to whether the investors are non-U.S. investors.

Secondly, the Service is entitled to confirm the correctness of [REDACTED]'s statement that the investors are in fact non-U.S. investors and that the Service has no interest in pursuing a tax liability against those non-U.S. investors. Although [REDACTED] has stated that these investors are non-U.S. investors, it is not clear how extensive [REDACTED]'s knowledge is as to these non-U.S. investors' possible United States tax liabilities.

Thirdly, the non-U.S. investors may be entities through which a U.S. person's tax liability is affected.

Fourthly, the non-U.S. investor may have transferred the tax shelter interest to a person with a U.S. tax liability.

For the above reasons, it is our opinion that the Service is entitled to obtain from [REDACTED] the non-U.S. investor list information.

If you have any questions, please direct them to the undersigned at (619) 557-6014.

#### DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

GORDON L. GIDLUND  
Associate Area Counsel (LMSB)

By: \_\_\_\_\_

ROBERT E. CUDLIP  
Attorney (LMSB)